FUNDAMENTAL ERROR REPORTER

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Rule 31.13(c) Appellate briefs—Contents.

31.13.c.010 The appellate brief must contain citations to the appropriate authority.

State v. Patterson, 222 Ariz. 574, 218 P.3d 1031, ¶¶ 7-21 (Ct. App. 2009) (court noted Arizona Court of Appeals is single court, and although it has division 1 and division 2, opinions are issued by three-judge panels; because court has no authority to sit "en banc," it is incorrect to refer to opinion from court of appeals as "Division 1" opinion or "Division 2" opinion; court held there is no rule requiring that, when trial court is confronted with conflicting opinions issued by panel in division 1 and panel in division 2, it must follow opinion from geographical area within which trial court is located; instead, trial court should follow opinion that trial court concludes is most persuasive).

31.13.c.020 When a defendant's action or inaction caused the error to which the defendant objects on appeal, the appellate court will consider the error to have been **invited** and will not grant relief to the defendant.

State v. Pandeli, 215 Ariz. 514, 161 P.3d 557, ¶¶ 48–50 (2007) (defendant contended trial court improperly allowed former girlfriend to testify that defendant molested her daughter; because, when trial court asked whether defendant's attorney objected to child molestation testimony, defendant's attorney explicitly stated that he did not, court held that defendant may not assert error on appeal on that point).

State v. Roque, 213 Ariz. 193, 141 P.3d 368, ¶¶ 136–37 (2006) (trial court instructed jurors they could consider as mitigating circumstances whether defendant's capacity was "significantly impaired," and whether defendant was under "unusual and substantial duress"; defendant contended trial court erred in not instructing jurors to consider as mitigating circumstances evidence of "simple" impairment and "simple" duress; court held that, because defendant requested instructions given, defendant invited any error and waived his right to challenge instructions on appeal).

31.13.c.030 When a defendant did not object at trial, a reviewing court will consider alleged trial error under the fundamental error standard; to obtain relief under the fundamental error standard, the defendant has the burden of persuading the court that (1) error exists, (2) the error is fundamental, and (3) the error caused prejudice.

State v. Henderson, 210 Ariz. 561, 115 P.3d 601, ¶¶ 18–21 (2005) (court held it would review *Blakely* error under fundamental error standard rather than harmless error standard).

31.13.c.040 When a defendant **did** object at trial and thereby preserves an issue for appeal, a reviewing court will consider alleged trial error under the **harmless error standard**; to prove error was harmless, the state must prove beyond a reasonable doubt that the error did not contribute to or affect the verdict or sentence.

State v. Henderson, 210 Ariz. 561, 115 P.3d 601, ¶¶ 18–21 (2005) (court held it would review *Blakely* error under fundamental error standard rather than harmless error standard).

31.13.c.050 When a defendant did not object at trial and the appellate court finds structural error, prejudice is presumed and reversal is mandated.

State v. Valverde, 220 Ariz. 582, 208 P.3d 233, ¶ 10 (2009) (court stated that, if appellate court finds structural error, reversal is mandated regardless whether objections was made below or prejudice is found).

Rule 31.13(c) Appellate briefs—Contents—Invited error.

31.13.c.ie.010 If a defendant declines the trial court's offer to take remedial steps, the defendant will be considered to have **invited** any error and waived on appeal any claim of error.

State v. Speer, 221 Ariz. 449, 212 P.3d 787, ¶¶ 69–76 (2009) (prosecutor inadvertently had contact with one of jurors; next day when trial court questioned juror, deputy brought defendant into courtroom in handcuffs; trial court immediately asked deputy to bring defendant back into courtroom later; trial court offered to dismiss that juror and seat last remaining alternate; defendant's attorney declined offer because he believed that juror was favorable to returning life sentence; court held that, by rejecting trial court's offer, defendant could not claim error on appeal).

31.13.c.ie.020 When the defendant's counsel specifically declines to make a certain argument at the trial level, the defendant will be considered to have **invited** any error and the appellate court may properly decline to address that argument if made on appeal.

State v. LeBrun, 222 Ariz. 183, 213 P.3d 332, ¶¶ 8–9 (Ct. App. 2009) (on appeal, defendant contended that admission of other act evidence violated his constitutional right to due process; court noted that defendant's trial counsel specifically told trial court that defendant was not relying on claim of violation of constitutional right to due process, so court declined to consider on appeal that constitutional claim).

31.13.c.ie.030 When the defendant's counsel takes some action and the prosecutor then responds to that action, any error committed by prosecutor will be considered invited.

State v. McKenna, 222 Ariz. 396, 214 P.3d 1037, ¶¶ 29–36 (Ct. App. 2009) (in closing, defendant's attorney contended state failed to prove motive and thus failed to prove premeditation; prosecutor then argued to jurors that defendant could have told police why he did what he did but he did not, and that was why there was no evidence of motive; defendant contended this was comment on his failure to testify; court held that it was permissible for prosecutor to argue that defendant, in his statement to police, did not give full explanation, and thus this was not comment on defendant's failure to testify; court additionally noted that prosecutor's remarks were in response to defense argument that state had failed to prove motive).

State v. Leyvas, 221 Ariz. 181, 211 P.3d 1165, ¶ 25 (Ct. App. 2009) (about 7 months after crime and few weeks before trial, detective showed witness six-person photographic lineup that contained defendant's photograph, but witness identified another man as person she had seen near crime scene; in subsequent pre-trial interview, prosecutor told witness she had identified wrong person; at trial, prosecutor did not ask witness to identify defendant; on cross-examination, defendant's attorney questioned witness about her inability to identify defendant in photographic lineup; on redirect, prosecutor asked witness and she identified defendant as person she had seen near crime scene; court held that, if allowing witness to identify defendant at trial was error, any error was invited).

31.13.c.ie.040 When the defendant's counsel agrees with either the trial court or the prosecutor on a course of action, the reviewing court will consider any error to be invited.

State v. Pandeli, 215 Ariz. 514, 161 P.3d 557, ¶¶ 48–50 (2007) (defendant contended trial court improperly allowed former girlfriend to testify that defendant molested her daughter; because, when trial court asked whether defendant's attorney objected to child molestation testimony, defendant's attorney explicitly stated that he did not, court held that defendant may not assert error on appeal on that point).

State v. Yegan, 223 Ariz. 213, 221 P.3d 1027, ¶¶ 16–24 (Ct. App. 2009) (defendant was charged with luring minor for sexual exploitation; state provided trial court with proposed jury instruction that was erroneous because, rather than using definition of "sexual conduct" that applied to statute prohibiting sexual exploitation of children, it used definition of "sexual conduct" that applied to statute prohibiting obscenity; defendant did not object to state's proposed instruction, but provided his own proposed instruction based on same incorrect statute as state's proposed instruction; court held that, "notwith-standing that the State committed the same error, Yegan was still responsible for submitting an erroneous instruction," and thus held defendant invited any error).

State v. Escobedo, 222 Ariz. 252, 213 P.3d 689, ¶¶ 49–51 (Ct. App. 2009) (court analyzed Arizona Supreme Court cases to determine whether court used conjunctive or disjunctive test to determine whether error is structural; court held that failure to impanel jury of 12 persons is not structural error, and must instead be reviewed under fundamental error analysis; court noted, however, that defendant's attorney and prosecutor submitted joint pre-trial statement in which they said that eight jurors would be required; court stated that, "Under such circumstances, we do not review for fundamental error and consider whether Defendant has met his burden of establishing prejudice"; court therefore affirmed conviction), aff'd, 2010 WL 532342 (Ct. App. Feb. 16, 2010).

31.13.c.ie.050 Even when the defendant's counsel and the prosecutor agree on a course of action, the reviewing court will not consider any error to be invited; instead, invited error should be limited to affirmative, independent action of a party requesting error rather than mild acquiescence in that error.

State v. Lucero, 223 Ariz. 129, 220 P.3d 249, ¶¶ 17–33 (Ct. App. 2009) (jurors submitted question whether special agent from U.S. Army Criminal Investigation Division was law enforcement officer; trial court proposed instructing jurors, "You have heard the facts of the case. It is up to you to make this determination." Trial court asked if there was any objection to that response; prosecutor said, "No, your honor." Defendant's attorney said, "No, that sounds right." Court held trial court should have found as matter of law that special agent was law enforcement officer and thus erred in instructing jurors that they had to determine as factual matter whether special agent was law enforcement officer; court further held that, because defendant's attorney was not source of error, nor did defendant's attorney affirmatively argue for suggested response, defendant's attorney did not invite error; court distinguished Pandeli because, in Escobedo, court characterized Pandeli's attorney as not only agreeing with trial court's position, but actively arguing for the error by giving legal reasons for it; court distinguished Yegan because defendant's attorney independently requested similar erroneous instruction; court held, however, that error was not fundamental because confessions were cumulative and thus defendant was not entitled to relief; specially concurring judge was of opinion that invited error doctrine was based on principles that underlie estoppel, not waiver, thus question was whether defendant should be estopped from receiving benefit of fundamental error review, and concluded that, because defendant's attorney actively participated in discussion and fully agreed with trial court's response, defendant should be estopped by invited error doctrine from having any claim of error review on appeal).

31.13.c.ie.060 When the defendant's counsel requests an instruction or requests that the trial court not give an instruction, equity favors the usual rule of **invited error** rather than the exceptional rule of fundamental error.

State v. Roseberry, 210 Ariz. 360, 111 P.3d 402, ¶ 53 (2005) (because defendant requested instruction that contained "significant impairment" language, he invited any error and waived this argument on appeal).

State v. Anderson, 210 Ariz. 327, 111 P.3d 369, ¶¶ 66, 67, 106 (2005) (because defendant requested *Portillo* instruction, he invited any error and waived this argument on appeal; although premeditation instruction contained language that Arizona Supreme Court had disapproved, because defendant requested this instruction, he invited any error; because defendant requested instruction that did not define "continuous course of criminal conduct," he invited any error in giving it).

State v. Logan, 200 Ariz. 564, 30 P.3d 631, ¶¶ 8-15 (2001) (defendant requested RAJI instruction on theft, which did not contain "without lawful authority" language; court held any error was invited, and stated that, when it determines any error is invited, it will not consider whether error is fundamental; "[When defendant's attorney requests an instruction,] equity favors the application of the usual rule of invited error rather than the exceptional rule of fundamental error." ¶ 15).

State v. Diaz, 168 Ariz. 363, 365–66, 813 P.2d 728, 730–31 (1991) (because defendant's attorney, in presenting duress defense, requested instruction that had been held error in *Hunter*, court applied usual rule of invited error rather than exceptional rule of fundamental error; "[When defendant's attorney requests an instruction,] equity favors the application of the usual rule of invited error rather than the exceptional rule of fundamental error." 168 Ariz. at 366, 813 P.2d at 731).

State v. Muscrove, 223 Ariz. 164, 221 P.3d 43, ¶¶ 8–9 (Ct. App. 2009) (defendant was charged with first-degree murder; defendant expressly informed trial court he did not want lesser-included offense instruction; court held any error in not giving instruction was invited and thus not grounds for reversal).

State v. Fish, 222 Ariz. 109, 213 P.3d 258, ¶¶ 79-80 (Ct. App. 2009) (because defendant expressly told trial court that he did not want lesser-included offense instruction on reckless manslaughter, if any error occurred, it was invited by defendant).

State v. Edmisten, 220 Ariz. 517, 207 P.3d 770, ¶¶ 10–11 (Ct. App. 2009) (because defendant requested instruction on whether degree of intoxication precluded particular mental state, he invited any error).

Rule 31.13(c) Appellate briefs—Contents—Fundamental error.

31.13.c.fe.010 Fundamental error is limited to those rare cases that involve error going to the foundation of the defendant's case, error that takes from the defendant a right essential to the defendant's defense, and error of such magnitude that the defendant could not possibly have received a fair trial, and places the burden on the defendant to show that the error was fundamental and prejudicial.

State v. Soliz, 223 Ariz. 116, 219 P.3d 1045, ¶ 12 (2009) (if defendant is facing charges for which defendant could have received sentence of 30 years or more, if prosecutor does not ask for 12-person jury and defendant does not object, maximum sentence defendant may receive is then less that 30 years, and trial by eight-person jury is not error).

State v. Bearup, 221 Ariz. 163, 211 P.3d 684, ¶¶ 20–31 (2009) (because defendant's defense was that he did not commit any crime (all or nothing defense), failure to give unlawful imprisonment instruction did not take from defendant any right essential to his defense, so failure to instruct on unlawful imprisonment was not fundamental error).

State v. Gomez, 211 Ariz. 494, 123 P.3d 1131, ¶¶ 26–27 (2005) (defendant did not object to trial court's instruction on premeditation, which was later disapproved in *Thompson*; because defendant's defense was that he did not commit charged offense (murder), rather than admitting that he did commit offense but claiming that it was not premeditated, instruction on premeditation did not take from defendant any right essential to defense that he presented, thus any error was not fundamental).

State v. Moody, 208 Ariz. 424, 94 P.3d 1119, ¶¶ 188-96 (2004) (because defendant's defense was that killings were result of psychosis and not from cocaine addiction or drug intoxication, erroneous instruction that jurors could not consider intoxication in determining whether defendant acted intentionally did not take from defendant right essential to defense he presented, thus error was not fundamental).

State v. Fimbres, 222 Ariz. 293, 213 P.3d 1020, ¶ 4 n.1 (Ct. App. 2009) (defendant was convicted of eight counts of various offenses; for six counts, he contended evidence was not sufficient to support convictions; court noted defendant moved for motion for judgment of acquittal for some counts he challenged on appeal and that any claim of error on omitted counts was forfeited absent fundamental error, but conviction that is not supported by sufficient evidence does not constitute fundamental error).

State v. Fimbres, 222 Ariz. 293, 213 P.3d 1020, ¶¶ 26-27 & n.5, 37-45 (Ct. App. 2009) (defendant purchased merchandise using gift cards that had been altered so that information encoded on magnetic strips corresponded to various credit and debit cards belonging to persons other than defendant; defendant was charged with falsely using credit card under § 13-2104(A)(2); trial court instructed jurors not only for § 13-2104(A)(2), but also on altering credit card under § 13-2104(A)(1); although defendant did not raise this issue with trial court, he contended on appeal that trial court lacked subject matter jurisdiction to convict him under section (A)(1); court stated that conviction when trial court did not have subject matter jurisdiction would be fundamental, prejudicial error, thus claim of lack of subject matter jurisdiction may be raised at any point in proceedings; court concluded, however, that any error here did not affect subject matter jurisdiction, thus defendant had to establish fundamental error and prejudice; court noted that

defendant's defense at trial was that he did not have intent to defraud, and because intent to defraud was element of both sections (A)(1) and (A)(2), instructing under (A)(1) did not take from defendant any right essential to his defense, thus any error was not fundamental; court further held that defendant failed to show prejudice, so he was not entitled to relief).

State v. Escobedo, 222 Ariz. 252, 213 P.3d 689, ¶¶ 2, 20–23, 48 (Ct. App. 2009) (court analyzed Arizona Supreme Court cases to determine whether court used conjunctive or disjunctive test to determine whether error is structural; court held that failure to impanel jury of 12 persons is not structural error, and must instead be reviewed under fundamental error analysis), aff'd, 2010 WL 532342 (Ct. App. Feb. 16, 2010).

31.13.c.fe.020 If the defendant did not object at trial, the appellate court will review only for fundamental error, and will grant relief if the defendant proves fundamental, prejudicial error.

State v. Henderson, 210 Ariz. 561, 115 P.3d 601, ¶¶ 23-35 (2005) (defendant claimed error under *Blakely*; court concluded defendant (1) proved error occurred, (2) that error was fundamental, and (3) that error prejudiced him; because defendant had already served his sentence by time of resolution of issues on appeal, court was unable to provide any relief).

State v. Paredes-Solano, ____ Ariz. ___, 222 P.3d 900, ¶¶ 8, 17–22 (Ct. App. 2009) (defendant was charged with sexual exploitation by "possessing, recording, filming, photographing, developing or duplicating" visual depictions of minor; court concluded that, because § 13–3553(A)(1) was directed at creation of visual image, while § 13–3553(A)(2) was directed at acts that can happen only after visual image is created, these two sections addressed two separate harms and created two separate offenses; because single count of indictment charged two distinct and separate offenses, indictment was duplicitous; because of possibility of non-unanimous jury verdict, defendant showed prejudice).

State v. Muscrove, 223 Ariz. 164, 221 P.3d 43, ¶¶ 10–14 (Ct. App. 2009) (court stated that double jeopardy violations are fundamental error; court held that, once trial court granted defendant's motion for judgment of acquittal, that resolved charge in defendant's favor, and for trial court to reconsider its decision and send that count to jurors placed defendant in double jeopardy).

State v. Chacon, 221 Ariz. 523, 212 P.3d 861, ¶¶ 5–11 (Ct. App. 2009) (court stated that matters of jurisdiction may be raised at any time; court concluded that, because no petition to revoke was filed before defendant's probation expired, trial court did not have jurisdiction to revoke defendant's probation, and so vacated trial court's finding of probation violation).

31.13.c.fe.030 If the defendant did not make a claim or an argument at trial court level, the appellate court may make up its own argument and reverse on that basis if it thinks it is a really good idea to do so.

State v. Guillen, 222 Ariz. 81, 213 P.3d 230, ¶¶ 18 n.2, 19, 30, 34–36 & nn. 13, 14, 15 16 (Ct. App. 2009) (officers received information that defendant was storing marijuana in his garage; when defendant and his wife were not home, officers brought narcotics dog to sniff garage, whereupon dog alerted on garage; when defendant's wife returned,

officers asked if they could search premises, and she consented; after narcotics dog alerted on freezer, officers obtained search warrant and discovered bales of marijuana in two other freezers; in motion to suppress, defendant contended "Officer Moreno's venture onto Defendant's property constituted a violation of Defendant's rights as protected by the 4th Amendment to the United States Constitution and Article II, Section Eight of the Arizona Constitution," but made no argument how dog sniff would violate Arizona Constitution and made no mention of it at hearing before trial court; on appeal, appellate court concluded that dog sniff did not violate United States Constitution, but although defendant in his appellate brief did nothing more that repeat almost verbatim his "venture onto Defendant's property" statement, appellate court held that dog sniff of outside of residence violated expectations of privacy under Arizona Constitution unless officers had reasonable suspicion to believe contraband may be found; majority stated that defendant's two references to Arizona Constitution provision were enough to alert trial court that defendant was asserting his motion to suppress under Arizona Constitution, and although majority agreed with dissent that defendant's limited reference to Arizona Constitution in appellate brief was not sufficient to trigger court's duty to review that claim, majority stated such deficiencies in appellate brief did not deprive it of jurisdiction and discretion to address inadequately raised claims when they involved matter of statewide importance, and that it would run risk of misdirecting law enforcement agencies if it did not advise them of its newly created mandate for dog sniffs under Arizona Constitution), vac'd, 2010 WL 132543 (Jan. 15, 2010).

31.13.c.fe.040 If the defendant did not object at trial, the appellate court will review only for fundamental error, and will not grant relief if the defendant fails to prove fundamental, prejudicial error.

State v. Diaz, 2010 WL 476010, ¶¶ 11–17 (Feb. 12, 2010) (trial court impaneled 15 jurors; at close of case, trial court excused three jurors and told jurors that "[a]ll 12 of you must agree on a verdict"; at point when jurors reconvened next day, record was silent on whether all 12 jurors were present; when jurors returned their verdict, trial court noted "the presence of the jury" and sua sponte polled jurors; transcript, however, only contained names of 11 jurors; after court of appeals issued its opinion reversing conviction, court reporter submitted revised transcript showing all 12 jurors were polled; court noted three standards of review, structural error, harmless error, and fundamental error, and that defendant must first establish some error, and held that even uncorrected record taken as a whole failed to show that only 11 jurors participated, thus no error).

State v. Kiles, 222 Ariz. 25, 213 P.3d 174, \P 15–22 (2009) (because defendant did not object at trial either to jury instruction on premeditation or prosecutor's statement that time required to premeditate could be "instantaneous," court reviewed for fundamental error only, and found no error).

State v. Moore, 222 Ariz. 1, 213 P.3d 150, ¶¶ 73-75 (2009) (although defendant's attorney did not object at trial, defendant claimed on appeal that trial court committed fundamental error in giving "acquittal first" instruction that was disapproved in *LeBlanc*; court held that use of that instruction did not deny defendant fair trial or deprive him of right essential to his defense, thus defendant failed to establish fundamental error).

State v. Bearup, 221 Ariz. 163, 211 P.3d 684, ¶¶ 20–31 (2009) (defendant was charged with kidnapping, and although he did not request instruction on unlawful imprisonment, he contended trial court committed fundamental error in not giving that instruction; because defendant's defense was that he did not commit any crime (all or nothing defense), failure to give unlawful imprisonment instruction did not take from defendant any right essential to his defense, so failure to instruct on unlawful imprisonment was not fundamental error).

State v. Valverde, 220 Ariz. 582, 208 P.3d 233, ¶¶ 9–18 (2009) (defendant's attorney did not request specific instruction on defendant's burden of proof for self-defense; trial court instructed on state's burden to prove all elements of offense beyond reasonable doubt and elements defendant had to prove to justify use of physical force in self-defense, but did not instruct on what level of proof was required to prove self-defense; court reviewed under fundamental error analysis; court noted that defendant's attorney argued to jurors correct standard, and held that defendant therefore failed to establish prejudice).

State v. Dann, 220 Ariz. 351, 207 P.3d 604, ¶¶ 102-04 (2009) (defendant contended trial court erred in conducting unrecorded bench conferences; because defendant did not object at trial, court reviewed for fundamental error; court held defendant who does not object to proceeding without reporter waives right to complain that proceedings were not recorded).

State v. Dann, 220 Ariz. 351, 207 P.3d 604, ¶¶ 52–54 (2009) (on appeal, defendant contended trial court's instruction impermissibly shifted burden to defendant; court found no error).

State v. Muscrove, 223 Ariz. 164, 221 P.3d 43, ¶ 3 (Ct. App. 2009) (at trial, defendant made no claim that conviction was based on "tainted" or "fabricated" evidence; court stated that defendant neither alleged nor showed fundamental, prejudicial error).

State v. Muscrove, 223 Ariz. 164, 221 P.3d 43, ¶ 4 (Ct. App. 2009) (defendant contended he should receive new trial due to alleged prosecutorial misconduct relating to specific line of questioning; court noted defendant never asked trial court for new trial, nor did his objection based on relevance preserve claim of prosecutorial misconduct; defendant never asserted error was fundamental, thus defendant waived issue on appeal).

State v. Lucero, 223 Ariz. 129, 220 P.3d 249, ¶¶ 11-15, 38-39 (Ct. App. 2009) (court held trial court should have found as matter of law that special agent from U.S. Army Criminal Investigation Division was law enforcement officer and thus erred in instructing jurors that they had to determine as factual matter whether special agent was law enforcement officer; court held, however, that error was not fundamental because confessions were cumulative and thus defendant was not entitled to relief).

State v. Haney, 223 Ariz. 64, 219 P.3d 274, ¶¶ 1–24 (Ct. App. 2009) (outside of home where defendant rented room, defendant and victim got into physical fight, and neighbor had to separate them; victim went inside house, but stayed just inside front door; defendant went into his bedroom, got his girlfriend's gun, and pointed it at victim; victim said, "Please don't shoot me," and backed out front door onto lawn; defendant shot victim two or three times in lower body causing victim to fall to ground; defendant walked over to victim and shot him two or three more times in buttocks; during trial, state and defendant

stipulated that defendant was prohibited possessor; although defendant did not ask trial court to instruct on justification under § 13–411, defendant contended on appeal that trial court committed fundamental error in not so instructing jurors; court held that, because defendant was prohibited possessor and thus was prohibited from possessing firearm, defendant did not have right to claim justification under § 13–411, thus trial court did not err in not instructing jurors on justification under § 13–411).

State v. Zinsmeyer, 222 Ariz. 612, 218 P.3d 1069, ¶¶ 34–36 (Ct. App. 2009) (at trial, defendant made no claim that burglary statute was unconstitutionally vague; on appeal, court rejected defendant's vagueness argument).

State v. Silva, 222 Ariz. 457, 216 P.3d 1203, ¶ 11 (Ct. App. 2009) (defendant contended trial court did not have jurisdiction because it ordered three separate restoration periods totaling over 32 months, which exceeded 21 months allowed by statute; because defendant did not object at trial, court reviewed for fundamental error only, and did not grant relief).

State v. McKenna, 222 Ariz. 396, 214 P.3d 1037, ¶¶ 9-11 (Ct. App. 2009) (defendant was convicted of felony murder; defendant contended trial court committed fundamental error in instructing on robbery as well as burglary as predicate felony; court concluded there was sufficient evidence to show defendant committed burglary, thus any error in instructing on robbery did not prejudice defendant, so defendant not entitled to relief).

State v. Forte, 222 Ariz. 389, 214 P.3d 1030, ¶¶ 14–22 (Ct. App. 2009) (court held trial court erred in holding sentencing with defendant appearing by interactive audiovisual system; because defendant did not object, court could only review for either structural error or fundamental error; court concluded error was not structural, and so reviewed for fundamental error; because it found defendant failed to show prejudice, affirmed sentence).

State v. Forte, 222 Ariz. 389, 214 P.3d 1030, ¶¶ 23–27 (Ct. App. 2009) (trial court held sentencing with defendant appearing by interactive audiovisual system; defendant contended this denied him his right to counsel; because defendant did not object, court could only review for either structural error or fundamental error; court concluded error was not structural, and so reviewed for fundamental error; because it found defendant failed to show prejudice, affirmed sentence).

State v. Lewis, 222 Ariz. 321, 214 P.3d 409, ¶ 13 (Ct. App. 2009) (as defendant was driving away from party with his brother and another in vehicle, someone at house fired at them; defendant and possibly his brother fired back, striking victim A; defendant was convicted of drive-by shooting and acquitted of aggravated assault; trial court ordered defendant to pay \$12,448.94 in restitution to victim A and her insurance company; although at trial defendant made no claim that his brother was the shooter, on appeal defendant contended that, because he had been acquitted of aggravated assault and thus his brother may have been the shooter, trial court erred in ordering him to pay restitution; court stated that, because defendant did not make "two shooters" argument to trial court, defendant forfeited review for all but fundamental, prejudicial error, and held that defendant failed to establish fundamental error).

State v. Fimbres, 222 Ariz. 293, 213 P.3d 1020, ¶¶ 42–43 (Ct. App. 2009) (defendant purchased merchandise using gift cards that had been altered so that information encoded on magnetic strips corresponded to various credit and debit cards belonging to other persons; defendant was charged with falsely using credit card under § 13–2104(A)(2); trial court instructed jurors not only for § 13–2104(A)(2), but also on altering credit card under § 13–2104(A)(1); although defendant did not raise this issue with trial court, he contended on appeal that trial court lacked subject matter jurisdiction to convict him under section (A)(1), and that this was fundamental error; court noted defendant did not request that trial court give jurors interrogatory requiring them to specify under which subsection they found him guilty, thus defendant could not establish that jurors convicted him under section (A)(1) and thus was unable to prove prejudice).

State v. Martinez, 221 Ariz. 383, 212 P.3d 75, ¶ 35 (Ct. App. 2009) (defendant raised for first time in reply brief that prosecutor engaged in misconduct by (1) meeting with jail inmate and then sending him back to his cell without instructing him not to elicit incriminating information from defendant, and (2) allowing defendant's girlfriend's mother to seize letters defendant sent to his girlfriend; because defendant did not raise these issues at trial, court reviewed for fundamental error only and found none).

State v. Streck, 221 Ariz. 306, 211 P.3d 1290, ¶ 3 & n.1 (Ct. App. 2009) (defendant sold farm tractor belonging to victim, and was convicted of theft of means of transportation; although he did not present argument to trial court, defendant claimed on appeal that farm tractor was not means of transportation for purposes of A.R.S. § 13–1814, theft of means of transportation; because defendant did not raise that issue at trial, court reviewed for fundamental error only and found none).

State v. Edmisten, 220 Ariz. 517, 207 P.3d 770, ¶¶ 10–11 (Ct. App. 2009) (because defendant did not object to trial court's not instructing on (1) level of proof necessary to show involuntary intoxication, (2) state's burden of proving every element of offense beyond reasonable doubt, and (3) operative effective of finding involuntary intoxication, appellate court reviewed for fundamental error and found none).

State v. Edmisten, 220 Ariz. 517, 207 P.3d 770, ¶¶ 20–21 (Ct. App. 2009) (because defendant at trial did not request that trial court give instruction that defendant did not have burden of proving involuntary intoxication, appellate court reviewed for fundamental error and found none).

State v. Edmisten, 220 Ariz. 517, 207 P.3d 770, ¶ 22 (Ct. App. 2009) (because defendant did not object at trial to prosecutor's closing argument (1) that he contended appealed to jurors' fears, unfairly inflamed their passions, and unfairly appealed to their prejudice and sympathy, and (2) that defendant could have called as witness another officer who was present at identification, appellate court reviewed for fundamental error and found none).

State v. Gonzalez, 220 Ariz. 82, 210 P.3d 1253, ¶¶ 7-8 (Ct App. 2009) (defendant made no claim at trial that failure to comply with police officer under A.R.S. § 28-622 was lesser-included offense of unlawful flight from pursuing law enforcement vehicle under A.R.S. § 28-622.01, thus court reviewed for fundamental error only and found none).

31.13.c.fe.050 If the defendant did not object to the trial court about the sentence or the sentencing procedure, including the validity of any prior conviction alleged, the defendant waives any error on appeal, and the appellate court may review the claim only for fundamental error.

State v. Smith, 219 Ariz. 132, 194 P.3d 399, ¶¶ 18–20 (2008) (on appeal, defendant contended his three foreign convictions would not have been felonies in Arizona; although defendant did not object to trial court about use of these foreign convictions to enhance his sentence, court held that defendant may seek review on appeal for fundamental error).

State v. Zinsmeyer, 222 Ariz. 612, 218 P.3d 1069, ¶ 26 (Ct. App. 2009) (court noted defendant did not object to imposition of aggravated sentence, but held that imposition of illegal sentence is fundamental error and that error prejudiced defendant).

State v. Zinsmeyer, 222 Ariz. 612, 218 P.3d 1069, ¶ 37 (Ct. App. 2009) (court held premature entry of criminal restitution order constitutes illegal sentence, which is fundamental reversible error).

State v. Geeslin, 221 Ariz. 574, 212 P.3d 912, ¶¶ 10–20 (Ct. App. 2009) (although defendant informally admitted prior convictions, trial court did not follow proper Rule 17.2 and 17.6 procedure, which court found was fundamental error, so court remanded for defendant to demonstrate she was prejudiced by trial court's error).

State v. Norris, 221 Ariz. 158, 211 P.3d 36, ¶ 1 (Ct. App. 2009) (although defendant did not raise at trial claim that his federal conviction did not qualify as historical prior felony conviction under Arizona law, court reviewed for fundamental error, vacated defendant's sentence, and remanded for resentencing).

State v. Lewandowski, 220 Ariz. 531, 207 P.3d 784, ¶¶ 4-15 (Ct. App. 2009) (at time trial court sentenced, it imposed fines and surcharges of \$5,400 and entered criminal restitution order for that amount; because defendant did not object, court reviewed for fundamental error; court held that trial court erred entering criminal restitution order, and that criminal restitution order resulted in illegal sentence because defendant would have to pay interest prior to time that statute allowed).

State v. Osborn, 220 Ariz. 174, 204 P.3d 432, ¶ 4 (Ct. App. 2009) (although defendant did not raise at trial claim that trial court did not follow proper procedure in establishing historical prior conviction, court reviewed for fundamental error, vacated defendant's sentence, and remanded for resentencing).

31.13.c.fe.060 Although a trial court is not supposed to consider a matter raised for the first time in a reply to a response to a motion because it would be untimely, if the trial court did consider and rule on the merits of a matter the appellant raises in a reply, the appellate court may consider the merits of the claim.

State v. Vannoy, 177 Ariz. 206, 209–10, 866 P.2d 874, 877–78 (Ct. App. 1993) (at trial, defendant raised for first time in his reply to state's response to his motion to suppress his claim that state did not provide him with breath sample for independent test; because trial court addressed merits of this claim, appellate court also addressed issue).

Rule 31.13(c) Appellate briefs—Contents—Harmless error.

31.13.c.he.010 When a defendant did object at trial and thereby preserves an issue for appeal, if the appellate court concludes there was error, the court will reverse unless the state proves beyond a reasonable doubt that the error did not contribute to or affect the verdict or sentence.

State v. Freeney, 223 Ariz. 110, 219 P.3d 1039, ¶¶ 21–28 (2009) (grand jury indicted defendant for aggravated assault based on § 13–1203(A)(2) (placing another in reasonable apprehension of imminent physical injury); on first day of trial, before jury selection, state moved to amend indictment to change theory of assault from § 13–1203(A)(2) to § 13–1203(A)(1) (causing physical injury to another); court held that amendment changed nature of offense; defendant contended error was prejudicial per se; court held defendant was thus claiming error was structural, and held error was not structural, but instead was subject to harmless-error analysis; court held that, because defendant had notice from (1) allegation of dangerousness, (2) police reports, medical reports, and photographs showing victim's injuries, and (3) joint pretrial statement that state was alleging that he caused physical injury to victim, any error was harmless beyond reasonable doubt).

Rule 31.13(c) Appellate briefs—Contents—Structural error.

31.13.c.se.010 The Arizona Supreme Court has described structural error as error that (1) deprived the defendant of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and error that (2) affected the entire conduct of the trial from beginning to end, and thus tainted the framework within which the trial proceeds; the Arizona Supreme Court has stated the test in the conjunctive in some cases and in the disjunctive in others.

State v. Soliz, 223 Ariz. 116, 219 P.3d 1045, ¶¶ 10, 12 (2009) (court described structural error as (1) only; court held that, if defendant is facing charges for which defendant could have received sentence of 30 years or more, if prosecutor does not ask for 12-person jury and defendant does not object, maximum sentence defendant may receive is then less that 30 years, and trial by eight-person jury is not error).

State v. Valverde, 220 Ariz. 582, 208 P.3d 233, ¶ 10 (2009) (court described structural error as (1) only; notes structural error is limited to such circumstances as denial of counsel or biased trier of fact).

State v. Garza, 216 Ariz. 56, 163 P.3d 1006, \P 20 n.6 (2007) (court described structural error as both (1) and (2), appearing to be disjunctive).

State v. Tucker, 215 Ariz. 298, 160 P.3d 177, \P 66 (2007) (court described structural error as both (1) and (2), appearing to be conjunctive).

State v. Henderson, 210 Ariz. 561, 115 P.3d 601, ¶ 12 (2005) (court described structural error as both (1) and (2), appearing to be disjunctive).

State v. Hickman, 205 Ariz. 192, 68 P.3d 418, ¶ 29 n.7 (2003) (court described structural error as both (1) and (2), appearing to be conjunctive).

State v. Ring, 204 Ariz. 534, 65 P.3d 915, ¶ 45-46 (2003) (court described structural error as (1) only; gives as examples biased trial judge, complete denial of criminal defense counsel, denial of access to criminal defense counsel during overnight trial recess, denial of self-representation in criminal cases, defective reasonable doubt jury instructions, exclusion of jurors of defendant's race from grand jury selection, excusing juror because of views on capital punishment, and denial of public criminal trial).

State v. Fimbres, 222 Ariz. 293, 213 P.3d 1020, ¶¶ 34-36 (Ct. App. 2009) (defendant purchased merchandise using gift cards that had been altered so that information encoded on magnetic strips corresponded to various credit and debit cards belonging to persons other than defendant; defendant was charged with falsely using credit card under § 13-2104(A)(2); trial court instructed jurors not only for § 13-2104(A)(2), but also on altering credit card under § 13-2104(A)(1); although defendant did not raise this issue with trial court, he contended on appeal that trial court lacked subject matter jurisdiction to convict him under section (A)(1), and that this was structural error; court noted that defendant failed to explain how any permeation or taint occurred, and that defendant's alleged error did not fall within category of cases that have been found to be structural error, and thus held defendant's alleged error was not structural error).

State v. Escobedo, 222 Ariz. 252, 213 P.3d 689, ¶¶ 2, 20–23, 48 (Ct. App. 2009) (court analyzed Arizona Supreme Court cases to determine whether court used conjunctive or disjunctive test to determine whether error is structural; court held that failure to impanel jury of 12 persons is not structural error, and must instead be reviewed under fundamental error analysis), aff'd, 2010 WL 532342 (Ct. App. Feb. 16, 2010).

31.13.c.se.020 Labeling error "prejudicial per se" essentially equates the error to structural error; in order to be structural error, the error must satisfy structural error requirements.

State v. Freeney, 223 Ariz. 110, 219 P.3d 1039, ¶¶ 21–28 (2009) (grand jury indicted defendant for aggravated assault based on § 13–1203(A)(2) (placing another in reasonable apprehension of imminent physical injury); on first day of trial, before jury selection, state moved to amend indictment to change theory of assault from § 13–1203(A)(2) to § 13–1203(A)(1) (causing physical injury to another); court held that amendment changed nature of offense; defendant contended error was prejudicial per se; court held defendant was thus claiming error was structural, and held error was not structural, but instead was subject to harmless-error analysis; court held that, because defendant had notice from (1) allegation of dangerousness, (2) police reports, medical reports, and photographs showing victim's injuries, and (3) joint pretrial statement that state was alleging that he caused physical injury to victim, any error was harmless).

State v. Valverde, 220 Ariz. 582, 208 P.3d 233, ¶¶ 6, 14 (2009) (court noted that court of appeals concluded that failure to instruct jury properly on defendant's burden of proof for self-defense was fundamental error and prejudicial; court stated that, to extent court of appeals interpreted prior case law as establishing rule that error was prejudicial per se, it erred by conflating fundamental error with structural error).

31.13.c.se.030 If the defendant did not object at trial and the appellate court finds structural error, the court will grant relief without a showing of prejudice.

State v. Aragon, 221 Ariz. 88, 210 P.3d 1259, ¶ 9 (Ct. App. 2009) (even though defendant did not expressly invoke Sixth Amendment in requesting continuance for purpose of substituting counsel, court concluded trial court's denial of continuance was structural error and required reversal of defendant's convictions and sentences).

31.13.c.se.040 If the defendant did not object at trial and the appellate court does not find structural error, the court will not grant relief unless the defendant establishes fundamental error and shows prejudice.

State v. Moore, 222 Ariz. 1, 213 P.3d 150, ¶¶ 34–36 (2009) (defendant contended trial court committed structural error by not asking jurors if they thought death penalty should be imposed in all cases in which person knowingly or intentionally killed another; because trial court allowed attorneys to question jurors and defendant's attorney asked this question, court found no error).

State v. Forte, 222 Ariz. 389, 214 P.3d 1030, ¶¶ 14–22 (Ct. App. 2009) (court held trial court erred in holding sentencing with defendant appearing by interactive audiovisual system; because defendant did not object, court could only review for either structural error or fundamental error; court concluded error was not structural, and so reviewed for fundamental error; because it found defendant failed to show prejudice, affirmed sentence).

State v. Forte, 222 Ariz. 389, 214 P.3d 1030, ¶¶ 23–27 (Ct. App. 2009) (trial court held sentencing with defendant appearing by interactive audiovisual system; defendant contended this denied him his right to counsel; because defendant did not object, court could only review for either structural error or fundamental error; court concluded error was not structural, and so reviewed for fundamental error; because it found defendant failed to show prejudice, affirmed sentence).

State v. Johnson, 220 Ariz. 551, 207 P.3d 804, ¶ 3 (Ct. App. 2009) (court reject defendant's argument that reasonable doubt instruction trial court gave was structural error).

31.13.c.se.050 Even assuming that trial counsel was deficient in numerous aspects, including failure to comply with ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, ABA Criminal Justice Defense Function Standards, and the Arizona Rules of Professional Conduct, this does not turn a claim of ineffective assistance of counsel into structural error, thus that claim must still be raised in a petition for post-conviction relief.

State v. Kiles, 222 Ariz. 25, 213 P.3d 174, ¶¶ 41–45 (2009) (defendant contended his trial counsel failed to assemble proper defense team, failed to investigate underlying facts of case, failed to communicate with him, and failed to represent him competently and diligently).

Rule 31.13(c) Appellate briefs—Contents—Appellate review.

31.13.c.ar.010 It is particularly inappropriate to consider an issue for the first time on appeal when the issue is a fact intensive one.

State v. Rogers, 186 Ariz. 508, 511, 924 P.2d 1027, 1030 (1996) (court of appeals offered alternative holding that, even if investigatory stop was illegal, defendant abandoned baggie after stop and during chase; inasmuch as state did not raise issue of abandonment at trial and no factual record was made on it, it would be inappropriate for appellate court to base ruling on that argument).

State v. West, 176 Ariz. 432, 440-41, 862 P.2d 192, 200-201 (1993) (whether police department had policy on inventory searches and followed it was fact-intensive question, because defendant did not raise that issue at trial, appellate court was not required to consider it on appeal, but did and rejected it).

State v. Brita, 158 Ariz. 121, 124, 761 P.2d 1025, 1028 (1988) (court of appeals improperly considered good faith exception raised by state for first time on appeal).

In re MH 2007-001895, 221 Ariz. 346, 212 P.3d 38, ¶¶ 14-15 (Ct. App. 2009) (at mental health evaluation hearing, trial court used interpreter from Language Line Services, who translated via speaker phone; because appellant made no claim to trial court that interpreter was not translating properly, appellate court presumed that all parties were able to hear and understand the proceedings; court held that appellant waived any objection that she did not receive a continuous simultaneous translation).

31.13.c.ar.020 The appellant has the duty to make a record at trial to support the claim of error on appeal, and absent such a record, the appellate court will presume that the missing portions of the record support the trial court's actions.

State v. Geeslin, 221 Ariz. 574, 212 P.3d 912, ¶¶ 7–9 (Ct. App. 2009) (defendant was charged with theft of means of transportation, and contended trial court erred when it refused to give her requested instruction on unlawful use of means of transportation; because record did not contain defendant's requested instruction, court presumed trial court acted correctly).

31.13.c.ar.030 Because the appellant is required to brief and argue on appeal all issues in the opening brief, and because Rule 31.13(c)(3) limits the reply brief to matters raised in the answering brief, the appellate court will not consider an issue that the appellant raises for the first time in a reply brief.

State v. Kiles, 222 Ariz. 25, 213 P.3d 174, ¶ 22 n.8 (2009) (court noted that defendant attempted to add new arguments in reply brief, but stated these arguments were waived).

State v. Cannon, 148 Ariz. 72, 79, 713 P.2d 273, 280 (1985) (defendant contended for first time in reply brief that trial court's voluntariness instruction was inadequate; because defendant failed to raise this issue in opening brief, appellate court considered issue only for fundamental error).

State v. Myers, 117 Ariz. 79, 87, 570 P.2d 1252, 1260 (1977) (defendant contended for first time in reply brief that Rule 10.1(b) gave him 10 days within which to file notice for change of judge, thus trial court should have given him 10-day continuance; appellate court considered this issue only to clarify rule).

Sulavka v. State, 223 Ariz. 208, 221 P.3d 1022, ¶ 13 n.2 (Ct. App. 2009) (court declined to address state's contention, mentioned in passing for first time in reply brief, that because English Parliament passed shoplifting statute in 1698, larceny is not common-law antecedent to shoplifting).

State v. Larson, 222 Ariz. 341, 214 P.3d 429, ¶ 23 (Ct. App. 2009) (trial court admitted in evidence recorded portions of defendant's interrogation by police in which detective asserted defendant was guilty; in reply brief, defendant contended trial court should have precluded detective's statements under Rule 403; court held that, because defendant did not make that claim in opening brief, he waived that claim).

State v. Martinez, 221 Ariz. 383, 212 P.3d 75, ¶ 35 (Ct. App. 2009) (defendant raised for first time in reply brief that prosecutor engaged in misconduct by (1) meeting with jail inmate and then sending him back to his cell without instructing him not to elicit incriminating information from defendant, and (2) allowing defendant's girlfriend's mother to seize letters defendant sent to his girlfriend; because defendant did not raise these issues at trial, court reviewed for fundamental error only and found no error).

State v. Edmisten, 220 Ariz. 517, 207 P.3d 770, ¶ 10 & n.2 (Ct. App. 2009) (because defendant in his reply brief raised argument that involuntary intoxication is like justification defense and thus state has burden to disprove involuntary intoxication, court did not address that issue).

31.13.c.ar.040 Although Rule 32.6 does not expressly limit the content of a defendant's reply in a post-conviction relief proceeding as Rule 31.13 does, because Rule 32.5 requires the defendant to include in the petition every ground known for relief, and Rule 32.6(d) provides that, after the defendant files a petition for post-conviction relief, no amendments shall be permitted except by leave of the court upon a showing of good cause, the court should not consider claims raised for the first time in the defendant's reply to the state's response to the defendant's petition for post-conviction relief.

State v. Lopez, 223 Ariz. 238, 221 P.3d 1052, ¶¶ 4–7 (Ct. App. 2009) (in his petition for post-conviction relief, defendant challenged assessment of attorney's fees; in his reply to state's response, he asserted additional claims of ineffective assistance of counsel; court held trial court correctly refused to consider defendant's ineffective assistance of counsel claims).

31.13.c.ar.050 Arguments raised for the first time at oral argument on appeal are generally waived.

State v. Campoy (Crockwell), 220 Ariz. 539, 207 P.3d 792, ¶ 25 n.4 (Ct App. 2009) (because defendant for first time at oral argument contended that his three statements made pursuant to plea agreement were not materially inconsistent and that trial court never found that he had been untruthful, court considered those arguments waived).

State v. Campoy (Crockwell), 220 Ariz. 539, 207 P.3d 792, ¶ 27 n.6 (Ct App. 2009) (because defendant for first time at oral argument contended that plea agreement and letter preceding it were ambiguous and should be construed in his favor, court did not address that argument).

State v. Edmisten, 220 Ariz. 517, 207 P.3d 770, ¶¶ 10-11 (Ct. App. 2009) (because defendant for first time at oral argument contended instruction on whether degree of intoxication precluded particular mental state, he waived any error).

State v. Edmisten, 220 Ariz. 517, 207 P.3d 770, ¶¶ 20-21 (Ct. App. 2009) (because defendant for first time at oral argument contended trial court should have instructed that defendant did not have burden of proving involuntary intoxication, he waived any error).

31.13.c.ar.060 If a party raises a claim at trial but does not raise it in the appellate brief on appeal, or raises a claim of error in the appellate brief but does not argue it and include appropriate references to the record, or raises a claim of error in a footnote to the brief rather than in the body of the brief, the appellate court will consider the claim abandoned.

State v. Hardesty, 222 Ariz. 363, 214 P.3d 1004, ¶ 7 & n.6 (2009) (although defendant presented his defense under provisions of Arizona and Federal Constitutions and various federal statutes, defendant failed to provide arguments on International Religious Freedom Act or Arizona Constitution art. 20, ¶ 1; court stated that, because it had no way of knowing what defendant's claims were, it had no basis on which to review them).

State v. Kiles, 222 Ariz. 25, 213 P.3d 174, ¶ 36 (2009) (defendant contended trial court erred in admitting various photographs; because defendant in his opening brief specified his objection to only two photographs, court held defendant waived any argument for the other photographs).

State v. Miller, 186 Ariz. 314, 323, 921 P.2d 1151, 1160 (1996) (defendant waived issue by including it in a footnote).

State v. Bolton, 182 Ariz. 290, 896 P.2d 830 (1995) (defendant merely listed certain claims without including sufficient arguments; court rejected defendant's claim that such was necessary because of the court's 80 page limit on death penalty briefs).

State v. Apelt (Michael), 176 Ariz. 349, 861 P.2d 634 (1993) (because defendant did not direct trial court to which statements defendant claimed were improperly admitted, court did not consider claim that there was insufficient evidence of conspiracy to admit statements).

State v. Rossi, 171 Ariz. 276, 830 P.2d 797 (1992) (by failing to include in opening brief claim that mitigating circumstances discussed in second appeal were law of the case and instead raising this claim in supplemental citation of legal authorities, defendant abandoned and waived this claim on appeal).

State v. Carver, 160 Ariz. 167, 771 P.2d 1382 (1989) (by merely listing issues and failing to present argument why they required reversal, counsel waived these issues on appeal; court nevertheless considered whether they were fundamental error).

State v. Rankovich, 159 Ariz. 116, 121 n.2, 765 P.2d 518, 523 n.2 (1988) (because defendant merely asserted that prosecutor wrongfully expressed opinion, but failed to argue issue or provide any specific instances of misconduct, court considered issue waived on appeal).

State v. Nirschel, 155 Ariz. 206, 208, 745 P.2d 953, 955 (1987) (merely stating that trial counsel provided ineffective assistance of counsel based on two specific failures to object, but then not arguing why this was so, waived issue on appeal; court examined the claims for fundamental error and found none).

State v. McCall, 139 Ariz. 147, 163, 677 P.2d 920, 936 (1983) (because appellant did not contend in his opening brief that statements were not made in furtherance of conspiracy, Appellant waived that claim).

State v. Smith, 125 Ariz. 412, 416, 610 P.2d 46, 50 (1980) (by merely stating that sentence violates double jeopardy and ex post facto, and was cruel and unusual punishment, but not arguing why this was so, the court considered these issues abandoned on appeal).

State v. Blodgette, 121 Ariz. 392, 395, 590 P.2d 931, 934 (1979) (counsel raised four additional claims of error but failed to argue them, so court considered them abandoned; court reviewed the record for fundamental error and found none).

State v. Gissendaner, 177 Ariz. 81, 865 P.2d 125 (Ct. App. 1993) (although state argued in trial court that police were justified in entering home because they were in hot pursuit, state did not make this argument on appeal, so the court considered it abandoned).

State v. Krantz, 174 Ariz. 211, 848 P.2d 296 (Ct. App. 1992) (appellant made no claim on appeal that his statements were inadmissible at trial, thus he abandoned that issue).

State v. Petzoldt, 172 Ariz. 272, 276, 836 P.2d 982, 986 (Ct. App. 1991) (because appellant merely claimed that admission of notebooks violated confrontation provision of Arizona Constitution but failed to argue why Arizona provision was any different than federal provision, the court considered that issue abandoned on appeal).

State v. Rodriguez, 160 Ariz. 381, 773 P.2d 486 (Ct. App. 1989) (by not taking exception to basis for trial court's ruling nor with possible alternatives to the suppression of evidence, state waived consideration of these issues).

State v. Felkins, 156 Ariz. 37, 749 P.2d 946 (Ct. App. 1988) (by merely stating that A.R.S. § 13–1006(B) was unconstitutional without giving argument or authority, court deems issue abandoned).

31.13.c.ar.070 If the defendant does not make an argument on a specific point in its appellate brief on appeal, the appellate court may make up its own argument and reverse on that basis if it thinks it is a really good idea to do so.

State v. Guillen, 222 Ariz. 81, 213 P.3d 230, ¶¶ 18 n.2, 19, 30, 34–36 & nn. 13, 14, 15 16 (Ct. App. 2009) (officers received information that defendant was storing marijuana in his garage; when defendant and his wife were not home, officers brought narcotics dog to sniff garage, whereupon dog alerted on garage; when defendant's wife returned, officers asked if they could search premises, and she consented; after narcotics dog alerted on freezer, officers obtained search warrant and discovered bales of marijuana in two other freezers; in motion to suppress, defendant contended "Officer Moreno's venture onto Defendant's property constituted a violation of Defendant's rights as protected by the 4th Amendment to the United States Constitution and Article II, Section Eight of the Arizona Constitution," but made no argument how dog sniff would violate Arizona Constitution and made no mention of it at hearing before trial court; on appeal, appellate court concluded that dog sniff did not violate United States Constitution, but although defendant in his appellate brief did nothing more that repeat almost verbatim his "venture onto Defendant's property" statement, appellate court held that dog sniff of

outside of residence violated expectations of privacy under Arizona Constitution unless officers had reasonable suspicion to believe contraband may be found; majority stated that defendant's two references to Arizona Constitution provision were enough to alert trial court that defendant was asserting his motion to suppress under Arizona Constitution, and although majority agreed with dissent that defendant's limited reference to Arizona Constitution in appellate brief was not sufficient to trigger court's duty to review that claim, majority stated such deficiencies in appellate brief did not deprive it of jurisdiction and discretion to address inadequately raised claims when they involved matter of statewide importance, and that it would run risk of misdirecting law enforcement agencies if it did not advise them of its newly created mandate for dog sniffs under Arizona Constitution), vac'd, 2010 WL 132543 (Jan. 15, 2010).

31.13.c.ar.080 When a defendant has an appeal pending and raises an issue in a petition for post-conviction relief, and the trial court dismisses that issue because the defendant could raise it in the appeal, if the defendant does not include that issue in the opening brief on appeal, the appellate court will consider that issue abandoned.

State v. Freeland, 176 Ariz. 544, 863 P.2d 263 (Ct. App. 1993) (defendant claimed in petition for post-conviction relief that mandatory sentence was cruel and unusual punishment; trial court dismissed that claim because defendant could raise it on appeal; because defendant did not include that issue in opening brief, court considered it abandoned).